Supreme Court, U.S.
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No. 01-46

IN THE

# Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
*Petitioner*,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The principle that a private party cannot sue a sovereign without its consent has been universally established and accepted since the Constitution was ratified and our system of government was thereby created. In this case, the United States Court of Appeals for the Fourth Circuit rejected a federal administrative agency's claim that it has the power to adjudicate a private cause of action against an unconsenting state. Properly considered, therefore, the petition for writ of certiorari asks this Court to decide the following question:

> Whether an unconsenting state is entitled to sovereign immunity from a private cause of action for specific relief and damages when that cause of action is before a federal administrative agency.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| STATEMENT OF THE CASE | 1 |
| 1. The Federal Maritime Commission | 2 |
| 2. The Regulation of Gambling Ships | 5 |
| 3. The Proceedings Below | 6 |
| REASONS FOR DENYING THE WRIT | 9 |
| I. This Court Should Deny the Petition Because the Decision Below Faithfully Followed This Court's Precedent | 11 |
| II. This Court Should Deny the Petition Because This Case Does Not Involve United States Oceanborne Foreign Commerce | 12 |
| III. This Court Should Deny the Petition Because Neither the United States nor the Commission Analyzed the Scope of Sovereign Immunity Asserted by the United States Before Executive Agencies | 14 |
| IV. This Court Should Deny the Petition Because the Commission's Arguments Are Without Merit | 16 |
| A. The Shipping Act Does Not Expressly Authorize Private Suits Against the States, Therefore, the Constitutionality of the Shipping Act Is Not at Issue | 16 |
| B. This Court Has Explicitly Rejected the Commission's Assertion that Federal Maritime Interests Can Trump the United States Constitution | 18 |

TABLE OF CONTENTS—Continued


| | Page |
|---|---|
| C. No Conflict Exists Among the United States Courts of Appeals Regarding State Sovereign Immunity | 21 |
| 1. Current Appellate Court Decisions Uniformly Apply the Doctrine of Sovereign Immunity in Federal Administrative Adjudications filed by Private Parties against Unconsenting States | 21 |
| 2. Cases Cited by the Commission Do Not Demonstrate a Split of Authority among the United States Courts of Appeals | 22 |
| CONCLUSION | 30 |
| APPENDIX A | 1a |
| APPENDIX B | 4a |




TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| *Alden v. Maine*, 527 U.S. 706 (1999) | *passim* |
| *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) | 18 |
| *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001) | 17-18 |
| *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) | 27 |
| *Breard v. Greene*, 523 U.S. 371 (1998) | 19 |
| *Brennan v. Iowa*, 494 F.2d 100 (8th Cir. 1974) | 23-24 |
| *Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999), *cert. denied*, 528 U.S. 1077 (2000) | 5 |
| *College Savings Bank v. Florida Prepaid Post-secondary Education Expense Board*, 527 U.S. 666 (1999) | 19, 24 |
| *Connecticut Department of Environmental Protection v. Occupational Safety and Health Administration*, 138 F. Supp. 2d 285 (D. Conn. 2001) | 21 |
| *Delaware Department of Health & Social Services v. United States Department of Education*, 772 F.2d 1123 (3d Cir. 1985) | 28 |
| *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563 (8th Cir. 1980) | 23-28 |
| *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973) | 24 |
| *Fitzpatrick v. Baker*, 427 U.S. 445 (1976) | 18 |
| *Florida v. United States*, 133 F. Supp. 2d 1280 (N.D. Fla. 2001) | 21 |
| *Hans v. Louisiana*, 134 U.S. 1 (1890) | 1, 11, 26 |
| *Hensel v. Office of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994) | 14-15 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *In re New York*, 256 U.S. 490 (1921) | 19-20 |
| *Kimel v. Flaorida Board of Regents*, 528 U.S. 62 (2000) | 17 |
| *Marshall v. A & M Consolidated Independent School District*, 605 F.2d 186 (5th Cir. 1979) | 24 |
| *Monaco v. Mississippi*, 292 U.S. 313 (1934) | 26 |
| *Ohio Environmental Protection Agency v. Department of Labor*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000) | 22 |
| *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964) | 24 |
| *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997) | 28 |
| *Rhode Island Department of Environmental Management v. Department of Labor*, 115 F. Supp. 2d 269 (D.R.I. 2000) | 22 |
| *Ristow v. South Carolina State Ports Authority*, 58 F.3d 1051 (4th Cir. 1995) | 6 |
| *South Carolina State Ports Authority v. Federal Maritime Commission*, 243 F.3d 165 (4th Cir. 2001) | *passim* |
| *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) | 19-20, 22, 29 |
| *Stardancer Casino, Inc. v. Stewart*, No. 25335, 2001 WL 848427 (S.C. July 30, 2001) | 6-7 |
| *Tennessee Department of Human Services v. United States Department of Education*, 979 F.2d 1162 (6th Cir.1992) | 28-29 |
| *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993) | 5 |
| *United States Term Limits, Inc. v. Thorton*, 514 U.S. 779 (1995) | 20 |
| *United States v. Mississippi*, 380 U.S. 128 (1965) | 25 |




TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Welch v. Texas Department of Highways & Public Transport*, 483 U.S. 468 (1987) | 19, 24 |
| *Williams v. United States*, 289 U.S. 553 (1933) | 20 |
| **STATUTES AND REGULATIONS** | |
| 15 U.S.C.A. § 1175 (West 1998) | 2, 5, 6, 13 |
| 18 U.S.C.A. § 7(1) (West 2000) | 5 |
| 20 U.S.C.A. § 107b(6) (West 2000) | 28 |
| 42 U.S.C. § 5851 | 26 |
| Shipping Act of 1984, Pub. L. No. 98-237 (1984) (codified as amended at 46 U.S.C.A. app. §§ 1701-1719 (West Supp. 2001)) ("Shipping Act") | *passim* |
| Pub. L. No. 102-251, § 202, 106 Stat. 60 (1992) | 5 |
| 46 C.F.R. § 501.5(i) (2000) | 3 |
| 46 C.F.R. § 502.42 (2000) | 27 |
| 46 C.F.R. § 502.227 (2000) | 4 |
| 46 C.F.R. § 502.281-291 (2000) | 3 |
| 46 C.F.R. § 502.285(a) (2000) | 4 |
| 46 C.F.R. pt. 502, subpt. J (2000) | 4 |
| 46 C.F.R. pt. 502, subpt. R (2000) | 4 |
| **CONSTITUTIONAL PROVISIONS** | |
| Article I | 21-22, 29 |
| Article III | 21, 28 |
| Eleventh Amendment | *passim* |
| **MISCELLANEOUS** | |
| 53 Cong. Rec. 8276 | 17-18 |
| 1990-1999 FED. MAR. COMM'N ANN. REPS. | 4 |
| *Exclusive Tug Franchises — Marine Terminal Operators Serving the Lower Mississippi River*, Docket No. 01-06, Order to Show Cause | 4 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| LLOYD'S REGISTER OF SHIPPING, [Vol. P-Z] REGISTER OF SHIPS 1999-2000 (1999) | 7 |
| THE FEDERALIST NO. 81 (Alexander Hamilton) (H. Dawson ed. 1876)) | 26 |


## STATEMENT OF THE CASE

This case involves the application of the State of South Carolina's sovereign immunity to bar a suit filed against an arm of the State by a private citizen with the Federal Maritime Commission ("Commission"). In the decision below, the United States Court of Appeals for the Fourth Circuit held that a state is entitled to assert its sovereign immunity in a suit filed by a private party with a federal administrative agency. *S.C. State Ports Auth. v. Fed. Mar. Comm'n*, 243 F.3d 165 (4th Cir. 2001) (Pet. App. A, 1a-25a). The Commission argues in its petition for a writ of certiorari that the Fourth Circuit's decision expands a state's sovereign immunity beyond the literal terms of the Eleventh Amendment and holds a federal statute unconstitutional. To the contrary, the Fourth Circuit's decision did not find the federal statute at issue unconstitutional, and the court correctly applied the doctrine of sovereign immunity consistently with this Court's seminal decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), and its progeny.

As with many other cases involving state sovereignty, the facts of this case do not fall squarely within the literal terms of the Eleventh Amendment. The complainant is a citizen of South Carolina and the respondent is an arm of that same state, whereas the Amendment speaks expressly to disputes between a citizen of one state and a different state. In *Hans*, this Court applied a state's sovereign immunity to a dispute between a private party and that party's own state. This Court has long counseled that state sovereign immunity "neither derives from nor is limited by the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Accordingly, the Amendment confirms, but does not establish the boundaries of, a state's sovereign immunity.

The Fourth Circuit considered the similarities between an administrative adjudication and a judicial proceeding. For example, if Congress creates a private cause of action before

a federal administrative agency that is indistinguishable from a cause of action in federal court, it logically follows that a sovereign's immunity in proceedings in one is available in the other. In this regard, the United States has also asserted its own immunity in proceedings before its executive agencies. *See Hensel v. Office of Chief Admin. Hearing Officer*, 38 F.3d 505 (10th Cir. 1994). In *Hensel*, the United States Department of Justice successfully asserted the sovereign immunity of the United States in the context of a proceeding before an administrative tribunal of the same Department of Justice. Thus, the Commission effectively asks this Court to address a question that implicates the immunity not only of the States, but also of the United States. However, as discussed below, neither the Commission nor the United States was able to address below the scope of the federal government's sovereign immunity before administrative agencies.

This case involves a challenge by a domestic company that was denied the right to use the port of Charleston, South Carolina, to operate gambling cruises. The regulation of gambling is a wholly domestic concern, and Congress ceded jurisdiction over gambling to the States in the Johnson Act. 15 U.S.C.A. § 1175 (West 1998), *reprinted in* Resp. App. at 1a-3a. The Commission has not addressed the relationship between the Johnson Act and its jurisdiction.

1. *The Federal Maritime Commission.* The Commission is a federal regulatory agency located in Washington, D.C., having specified regulatory response-bilities over ocean shipping services in United States foreign commerce set forth in the Shipping Act of 1984, Pub. L. No. 98-237 (1984) (codified as amended at 46 U.S.C.A. app. §§ 1701-1719 (West Supp. 2001)) ("Shipping Act"). The Commission primarily oversees certain agreements exempted from the antitrust laws among ocean common carriers or other entities, such as marine terminal operators, which are engaged in United States foreign commerce. Shipping Act §§ 4-7, 46



U.S.C.A. app. §§ 1703-1706 (West Supp. 2001). The Commission has no jurisdiction over gambling vessel operations, safety, environmental protection, navigation, vessel construction, vessel documentation, vessel inspection, or licensing of seafaring personnel. The principal shipping statute administered by the Commission is the Shipping Act. In pertinent part, the Act authorizes private formal complaints alleging violations of the Act, including the granting of "any undue or unreasonable preference" or "unreasonably refus[ing] to deal." Shipping Act §§ 10(d)(4) & (b)(10), respectively, 46 U.S.C.A. app. §§ 1709(d)(4) & (b)(10) (West Supp. 2001), respectively, *reprinted in* Pet. App. D at 63a.

The Shipping Act authorizes two kinds of proceedings to determine a violation of the Act. First, the Shipping Act allows the Commission to conduct its own investigations into alleged violations of the Act. Shipping Act § 11(c), 46 U.S.C.A. app. § 1710(c) (West Supp. 2001); *see also* 46 C.F.R. § 501.5(i) (2000) (responsibilities of the Bureau of Enforcement); 46 C.F.R. § 502.281-291 (2000) (nonadjudicatory investigations). Second, Section 11(a) of the Shipping Act allows a private citizen to file a complaint with the Commission for alleged violations of the Act. 46 U.S.C.A app. § 1710(a) (West Supp. 2001). The Act provides in part:

> (g) Reparations. For any complaint filed within 3 years after the *cause of action* accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this chapter plus reasonable attorney's fees.

46 U.S.C.A. app. § 1710(g) (West Supp. 2001) (emphasis added). The doctrine of sovereign immunity, embodied in the Eleventh Amendment, bars the proceeding when a private party files a complaint against a state.

As the Fourth Circuit properly concluded, when a party files a formal complaint with the Commission, the proceeding "takes the form of an adjudication." Pet. App. A at 15a. The case is assigned to an administrative law judge, who presides over the taking of discovery by parties, other pre-trial practice, and trial. 46 C.F.R. pt. 502, subpt. J (2000). The administrative law judge issues a decision that is final and binding unless a party requests review by the Commission or the Commission undertakes review on its own initiative. 46 C.F.R. § 502.227 (2000). "The proceeding thus walks, talks, and squawks very much like a lawsuit." Pet. App. A at 15a.

On the other hand, when the Commission initiates its own investigation, it selects the target(s) of the investigation, frames the issues, establishes a schedule for the investigation, and authorizes its representatives to conduct the investigation. 46 C.F.R. pt. 502, subpt. R (2000). In fact, the Commission primarily regulates through this investigatory authority. Since 1990, the Commission has brought an average of 224 formal investigations per year and collected an average of $6.3 million in civil penalties per year. 1990-1999 FED. MAR. COMM'N ANN. REPS. Further, the Commission may hold investigational hearings, which are "distinguished from hearings in adjudicatory proceedings," and seek an injunction in district court, if warranted. 46 C.F.R. § 502.285(a) (2000); *see also* 46 U.S.C.A. app. § 1713 (West Supp. 2001). Presumably, the Commission would consider whether it has jurisdiction over a controversy before it initiates its own investigation.[1] The Ports Authority does not challenge the

[1] *See Exclusive Tug Franchises—Marine Terminal Operators Serving the Lower Mississippi River*, Docket No. 01-06, Order to Show Cause at 2-3 (Fed. Mar. Comm'n, June 11, 2001), *available at* http://www.fmc.gov/ Dockets/01-06.pdf (providing an example of a case in which the Commission addressed the jurisdictional issue first).



Commission's authority to use this investigative authority to regulate state conduct.

Thus, the Fourth Circuit's decision does not impair the Commission's authority or ability to regulate state-run ports nor does it leave state-run ports "immune" from regulation. Petition at 17.

2. *The Regulation of Gambling Ships.* The Commission has no jurisdiction to regulate gambling, gambling cruises, or "cruises to nowhere" (gambling cruises with no fixed destination). In the Johnson Act, Congress explicitly recognized the preeminent state interest in controlling gambling and sought to enhance, not curb, state police power in this field. *Casino Ventures v. Stewart,* 183 F.3d 307, 311 (4th Cir. 1999), *cert. denied,* 528 U.S. 1077 (2000). Recent amendments to the Johnson Act confirm this explicit recognition. *Id.* (citing Pub. L. No. 102-251, § 202, 106 Stat. 60, 61-62 (1992)). The Shipping Act contains no authority to alter this statutory framework.

The Johnson Act reverses the ordinary preemption rules with respect to conflicting state and federal laws by expressly declaring Congress' intent to defer to state law.[2] 15 U.S.C.A. § 1175(b)(2) (West 1998). Moreover, the Johnson Act does not apply to state territorial waters. *Id.* § 1175(a) (Section 1175 applies only to vessels within the maritime and territorial jurisdiction as defined by § 7 of Title 18); 18 U.S.C.A. § 7(1) (West 2000) (specifically excludes state waters from United States maritime jurisdiction). The Act generally makes the use of gambling devices illegal in the United States. 15 U.S.C.A. § 1175(a) (West 1998). It carves out an exception to the general rule and allows gambling "on

[2] *Cf. United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 499-500 (1993) (interpreting a similar provision in the McCarran-Ferguson Act by which Congress restored the supremacy of the states over insurance regulation).

a vessel that is not within the boundaries of any State or possession of the United States." *Id.* § 1175(b)(1)(A). However, the Act explicitly permits a state to prohibit gambling "cruises to nowhere," cruises that begin and end at the same point, but go outside of United States territory for the purpose of gambling. *Id.* § 1175(b)(2).

Until the South Carolina Supreme Court's recent decision in *Stardancer*, the South Carolina government interpreted the State's anti-gambling statutes to prohibit the operation of cruises to nowhere. However, in *Stardancer*, the court held that cruises to nowhere do not violate any state criminal statute.[3] *Stardancer Casino, Inc. v. Stewart*, No. 25335, 2001 WL 848427, at *5 (S.C. July 30, 2001).

In effect, the Commission is claiming a "unique federal interest," (Petition at 16), in an area where Congress not only gave it no power to regulate, but also specifically recognized the primacy of a state's interest. Although the federal government has a legitimate interest in regulating oceanborne foreign commerce, this case does not implicate that interest.

3. *The Proceedings Below.* South Carolina Maritime Services, Inc., ("Maritime Services"), a South Carolina citizen, filed a complaint against respondent South Carolina State Ports Authority ("Ports Authority") before the Commission on October 27, 1999, seeking injunctive relief, damages, interest, and attorneys' fees for alleged violations of the Shipping Act. The Ports Authority is an agency of the State of South Carolina and an arm of the State. *Ristow v. S.C. State Ports Auth.*, 58 F.3d 1051, 1052 (4th Cir. 1995); *see also* Pet. App. A at 21a. Maritime Services chartered a passenger ship known as the M/V TROPIC SEA intending to offer gambling cruises to nowhere from the port of Charleston. The M/V TROPIC SEA was originally classified as

[3] The Ports Authority has not yet completed its analysis of the implications of this ruling on its policies.



a ferry.[4] Although it can board 800 passengers, it has overnight accommodations for only 200 passengers.

Until the South Carolina Supreme Court's recent *Stardancer* decision, the South Carolina government interpreted State law to prohibit cruises to nowhere. Consistent with the State's interpretation, the Ports Authority's written policy was to deny a passenger vessel a berth at Charleston's port if the vessel's primary purpose was gambling. Based on this policy and its finding that the M/V TROPIC SEA is primarily a gambling vessel, the Ports Authority denied Maritime Services a berth at Charleston harbor. In its complaint before the Commission, Maritime Services alleged that the Ports Authority allowed another cruise vessel to berth in Charleston's port, and that the Ports Authority's refusal to grant that privilege to the M/V TROPIC SEA was unreasonable under the Shipping Act. However, the other cruise vessel, operated by Carnival Cruise Lines, was unquestionably a vessel having a primary purpose other than gambling.

The Commission assigned the complaint to the Commission's chief administrative law judge, and the Ports Authority filed a motion to dismiss the complaint asserting, *inter alia*, its sovereign immunity.[5] Because the Ports Authority is indisputably an arm of the State of South Carolina, Chief Administrative Law Judge Kline granted the Ports Authority's motion and dismissed the complaint on January 5, 2000. Judge Kline concluded that the Commission could avoid all sovereign immunity issues by invoking its authority to institute its own investigation into the alleged

[4] LLOYD'S REGISTER OF SHIPPING, [Vol. P-Z] REGISTER OF SHIPS 1999-2000 at 1497 (1999). The M/V TROPIC SEA is also known as the M/V TROPICANA, the classification of which appears in this widely used industry ship register.

[5] The Ports Authority also challenged the Commission's authority to review the state regulation of gambling vessels under the Johnson Act and raised other jurisdictional issues.

violations, or the Commission could refer the case to the Commission's Bureau of Enforcement for its recommendation. Pet. App. C, 39a-62a.

Notwithstanding his recommendation, the Commission, *sua sponte,* reviewed and reversed Judge Kline's decision in a closed Commission meeting without briefing or a hearing. Pet. App. B, 27a-38a. The Ports Authority filed a timely petition for review with the United States Court of Appeals for the Fourth Circuit. The United States and the Commission appeared as respondents before the Fourth Circuit and took different positions on the enforceability of Commission orders against an unconsenting state. Below, the United States argued that the complainant could file and prosecute a suit with the Commission against an unconsenting state, but conceded that any reparations order issued by the Commission would not be enforceable in a federal district court. The Commission disagreed with the United States, arguing instead that its orders are fully enforceable against a state.

In a unanimous opinion written by Chief Judge Wilkinson, the Fourth Circuit reversed the Commission's judgment and remanded the case with instructions to dismiss. Pet. App. A at 25a. Relying upon Supreme Court precedent which holds that a state's sovereign immunity "transcends the forum in which the state is sued," the Fourth Circuit held that a state is entitled to assert its sovereign immunity in private complaints filed with federal administrative agencies. *Id.* at 6a. The Fourth Circuit's holding is also consistent with the Tenth Circuit's holding that both the United States and a state are entitled to assert sovereign immunity in a federal administrative agency's adjudication of a private complaint. *Hensel*, 38 F.3d at 508-10.



## REASONS FOR DENYING THE WRIT

The Supreme Court should deny the Commission's petition for a writ of certiorari for three reasons. First, the Fourth Circuit's decision correctly interprets and applies Supreme Court precedent. The decision upholds the doctrine of sovereign immunity, embodied in the Eleventh Amendment, and avoids depriving the State of its constitutional guarantees. Congress' creation of a private "cause of action" for specific relief, damages, interest, and attorney's fees, whether it lies before a federal administrative tribunal or a judicial tribunal, must be governed by the principles and limitations set forth in our constitutional structure of government. The Commission's implicit argument that federal administrative tribunals hold greater authority than the judiciary that oversees them is manifestly untenable.

Second, this case does not affect any important federal maritime policy. Whatever the federal interest may be in regulating United States maritime commerce, this case does not implicate that interest. Instead, this case presents a controversy arising out of the regulation of gambling cruises, and a substantial question exists about whether the Commission has any jurisdiction over the underlying controversy. The Commission itself has not addressed this issue.

Third, neither the Commission nor the United States addressed the scope or the implications of the federal government's immunity in proceedings before federal administrative agencies although the petition would require this Court to consider the sovereign immunity of both the United States and the States. Thus, that issue has not been properly developed for review by this Court.

The Commission advances three arguments in support of its petition for a writ of certiorari: 1) the Fourth Circuit held a provision of the Shipping Act unconstitutional; 2) fundamental differences exist between adjudications by judicial and administrative tribunals for sovereign immunity pur-

poses; and 3) the Fourth Circuit's decision conflicts with decisions of other United States courts of appeals which have considered the question presented here. As discussed below, each argument is incorrect, and none provides any basis for this Court to grant the petition.

First, and contrary to the Commission's assertions, the Fourth Circuit's decision does not invalidate any act of Congress. Rather, the Fourth Circuit held that the Ports Authority is entitled to assert its sovereign immunity in a private complaint proceeding before the Commission—just as it would be entitled to do if a private complaint were filed in a federal or state court. If permitting a government defendant to assert its sovereign immunity under a general statutory cause of action (one not specifically directed against a government) renders that statute unconstitutional, then many statutory remedies would not pass constitutional scrutiny.

Second, the differences that exist between adjudications by judicial tribunals and adjudications by administrative agencies do not warrant different applications of a state's sovereign immunity. Although differences exist between purely judicial tribunals and administrative tribunals, the doctrine of sovereign immunity applies "regardless of the forum." *Alden*, 527 U.S. at 749. Despite the vast differences between a federal court and a state court, this Court still applied sovereign immunity in state court proceedings in *Alden*. Likewise, the Fourth Circuit properly found that South Carolina is not stripped of its sovereign immunity simply because the private party sued the State before an administrative body, instead of in a federal or state court.

The Commission argues that one key difference between its administrative tribunal and a judicial tribunal is that it is exercising its authority over maritime commerce. As previously addressed, this case does not implicate the federal interest in maritime commerce. This case presents a controversy arising out of the regulation of gambling vessels, which



is a matter reserved to the States. Finally, the result would not change if federal maritime commerce were implicated here. Sovereign immunity applies in the context of the admiralty jurisdiction of the courts, which does implicate the federal interest in maritime commerce.[6]

Third, the Fourth Circuit's decision does not conflict with decisions of other United States courts of appeals. The Tenth Circuit is the only other court of appeals to consider the precise question presented here, and its decision in *Hensel* is consistent with the Fourth Circuit's decision. Thus, the Commission erroneously states that "the court construed a significant constitutional principle [sovereign immunity] in a novel manner and applied it to a branch of the federal government to which it has never before applied." Petition at 9. Because the Tenth Circuit addressed the precise issue presented below in 1994, the Commission's attempt to dismiss *Hensel* as "not compelling" is unpersuasive. Petition at 21.

As is discussed in detail below, each of the foregoing reasons provides an independent ground for this Court to deny the Commission's petition for a writ of certiorari.

## I. This Court Should Deny the Petition Because the Decision Below Faithfully Followed This Court's Precedent.

The Fourth Circuit correctly applied the "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution,—anomalous and unheard of when the constitution was adopted." *Hans,* 134 U.S. at 18. *Alden* establishes that the States entered the Union with their "sweeping" sovereignty intact, 527 U.S. at 745, and their immunity from suits filed by private citizens applies "regardless of the forum." *Id.* at 749.

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[6] *See infra* p. 19-20.

After conducting a careful review of both the Shipping Act and the Commission's procedures for implementing the Act, the Fourth Circuit reasoned: "The proceeding thus walks, talks, and squawks very much like a lawsuit. Its placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication." Pet. App. A at 15a. The Fourth Circuit held that "[w]hether the proceeding is formally called an administrative action, a lawsuit, or an adjudication does not matter. The fundamental fact, which respondents cannot escape, is that this proceeding requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state." *Id.* at 14a. Further, while noting the Commission's limited powers to enforce its non-reparation orders independently, the court rejected the argument that "the agency adjudication is so meaningless as to permit a private party to subject an unconsenting state to agency proceedings *because of* the adjudication's very emptiness." *Id.* at 17a. Rather,

> [a]ll parties, and certainly political entities such as states, have an interest in avoiding the stigma that attaches even to an unenforceable default judgment. Moreover, a state offends an agency that has plenary jurisdiction over its ports at its own peril. Indeed, the FMC may fine a state up to $25,000 per day for failure to comply with a Commission order.

*Id.* The Fourth Circuit's holding in this case is consistent with the form of government established by the United States Constitution, the doctrine of sovereign immunity embodied in the Eleventh Amendment, and this Court's sovereign immunity jurisprudence.

## II. This Court Should Deny the Petition Because This Case Does Not Involve United States Oceanborne Foreign Commerce.

This case involves the regulation of gambling vessels, power over which federal law expressly grants to the States.



In the proceeding before the Commission, the complainant sought review of the reasonableness of the Ports Authority's decision to prohibit it from berthing the M/V TROPIC SEA at Charleston's harbor. The complainant claimed that the Ports Authority's decision was unreasonable, invoking the Commission's power to ensure fair access to United States ports for oceangoing vessels engaged in "common carriage of goods by water in the foreign commerce of the United States." Shipping Act § 2(1), 46 U.S.C.A. app. § 1701(1) (West Supp. 2001).

This case does not involve the common carriage of goods in United States foreign commerce.[7] Instead, the dispute involves entirely domestic concerns of a South Carolina citizen and the State of South Carolina. The private party challenges the lawfulness of South Carolina's police power to regulate gambling vessels—oversight authority the Commission does not possess and has never claimed to possess. The Johnson Act expressly states that federal law does not preempt state laws that prohibit or regulate gambling activities within their borders. 15 U.S.C.A. § 1175 (West 1998). The Act withdraws federal regulation over gambling conducted in state territorial waters and permits the States to regulate gambling on vessels, even for voyages outside of a state's territorial waters. *Id.* Therefore, the federal government has no interest in a vessel's alleged right to operate gambling cruises from a state's port, and it certainly has no "unique" federal maritime interest in this issue.

The Commission's decision below analyzed only the sovereign immunity issue and failed to consider whether the Johnson Act forecloses its jurisdiction over this case. This is a substantial question because the true nature of Maritime Services' complaint is that it seeks federal agency review of state actions in an area Congress left expressly to the States.

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[7] Although the M/V TROPIC SEA is registered in the Bahamas, there are no registry-related issues in the case.

Because the Commission did not address this issue, it remains unresolved and the Court should deny certiorari in this case.

Even if this case involved a compelling national interest, the Commission should be prepared to assign its staff to investigate whether enforcement action against the Ports Authority is warranted under the Shipping Act. *See Alden*, 527 U.S. at 759-60 ("[t]he National Government must itself deem the case of sufficient importance to take action against the State"). The well-recognized limits on a state's sovereign immunity, along with the Shipping Act, allow the Commission to conduct its own investigations into alleged violations of the Shipping Act by the States. Thus, the Fourth Circuit's decision does not impair either the Commission's authority or its ability to regulate state-run ports nor does it leave state-run ports immune from Commission regulation. Instead, the Commission seeks to override South Carolina's immunity from suit and to allow a privately initiated complaint to regulate the conduct of the State.

### III. This Court Should Deny the Petition Because Neither The United States nor the Commission Analyzed the Scope of Sovereign Immunity Asserted by the United States Before Executive Agencies.

Sovereign immunity serves the same purpose under the Constitution whether it applies to one of the several states or to the United States itself. As the United States contended in *Hensel*, "[s]overeign immunity bars an action if, among other things, the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." Brief of the United States Department of Justice in *Hensel* on behalf of Respondent Oklahoma City Veterans Affairs Medical Center at 19-20 (citations and quotation marks omitted) (Resp. App. at 4a-6a); *see also Hensel*, 38 F.3d at 509 (sovereign



immunity protects the United States from judgments that would require an expenditure from public funds, interfere with public administration, restrain the Government from acting, or compel it to act). Similarly, as applied to the States, sovereign immunity prevents a state from "being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the state administers on the public's behalf." *Alden*, 527 U.S. at 749.

The United States has expressly asserted sovereign immunity as a bar to administrative adjudication seeking to compel government action and seeking monetary damages. This case involves the simple question of whether sovereign immunity applies to private complaints filed before federal administrative agencies. The United States took the position in *Hensel* that it does. No basis exists for distinguishing the United States Government's right to assert its sovereign immunity in federal administrative proceedings from a state's right to do the same. Rather, federalism and constitutional guarantees require the doctrine be applied in a manner consistent with a state's status as residuary sovereigns and joint participants in governing this Nation. *See Alden*, 527 U.S. at 748.

Under the Shipping Act, states are included within the definition of the "United States." *See* Shipping Act § 3(25), 46 U.S.C.A. app. § 1702(25) (West Supp. 2001) ("'United States' includes the several States"). Accordingly, if this Court rules on South Carolina's ability to assert its immunity in private actions before the Commission, the decision will affect not only the several States, but also the ability of the United States to assert its immunity before this administrative agency. As stated in *Alden*,

> "[i]t is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional

system recognizing the essential sovereignty of the States, *we are reluctant to conclude that the States are not entitled to a reciprocal privilege*."

*Alden*, 527 U.S. at 749-50 (emphasis added).

The Fourth Circuit recognized the importance of understanding the scope of the United States Government's immunity, and during oral argument, the court asked counsel for the United States to address the matter. Counsel was unable to answer the question, and the Fourth Circuit did not address the issue in its decision. Because a ruling in this case will affect the interests of the United States and because the Fourth Circuit was unable to make a complete analysis of those interests, this Court should deny the petition for a writ of certiorari.

## IV. This Court Should Deny the Petition Because the Commission's Arguments Are Without Merit.

### A. The Shipping Act Does Not Expressly Authorize Private Suits Against the States, Therefore, the Constitutionality of the Shipping Act Is Not at Issue.

The Commission argues that the Fourth Circuit's decision holds a provision of the Shipping Act unconstitutional. Petition at 9. However, the Commission fails to identify which provision of the Act the Fourth Circuit allegedly held unconstitutional. More importantly, the Commission never identifies any provision of the Shipping Act that provides a statement of congressional intent to abrogate the States' sovereign immunity.

For a private citizen to sue an unconsenting state for alleged statutory violations, Congress must have validly abrogated a state's immunity in the statute. To determine whether Congress validly abrogated a state's immunity, a two-fold analysis ensues. First, the statute must contain an unequivocal expression of Congress' intent to abrogate the



States' sovereign immunity. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (Congress' intent must be unmistakably clear). Second, Congress must have acted pursuant to a valid exercise of its powers when it expressed its intent to abrogate the States' immunity. *See, e.g., Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 962 (2001).

As to the first prong, the Shipping Act does not refer either to the Eleventh Amendment or to the States' sovereign immunity, as this Court's decisions require. Because no statutory language in the Shipping Act evidences Congress' intent to abrogate the States' immunity, the Commission gives only a single citation to the 1916 Congressional Record of a different statute in an unpersuasive effort to show Congress' intent to abrogate the States' sovereign immunity.[8] Petition at 10. This single citation to the legislative history of a predecessor statute does not even address the current Shipping Act and does not provide the "unmistakable language in the statute itself," necessary to demonstrate Congress' intent to subject unconsenting states to private suits

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[8] A review of the applicable provisions of the Shipping Act explains the Commission's silence as to which provision allegedly abrogates the States' immunity and is allegedly unconstitutional under the Fourth Circuit's decision. Section 3(14) of the Shipping Act defines a "marine terminal operator" as "a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier." 46 U.S.C.A. app. § 1702(14) (West Supp. 2001). "A 'person' includes individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country." Shipping Act § 3(18), 46 U.S.C.A. app. § 1702(18) (West Supp. 2001). Congress has not expressed its intent to abrogate the States' sovereign immunity anywhere in these provisions. The lack of congressional intent to abrogate sovereign immunity is further highlighted by the fact that Congress specifically included "the several States" within the definition of "United States." *See* Shipping Act § 3(25), 46 U.S.C.A. app. § 1702(25) (West Supp. 2001).

for monetary damages before an administrative agency such as the Commission. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985). In reality, the legislative history upon which the Commission relies is a small portion of the floor debate that touched, *in haec verba*, only on the regulation of "municipal" ports, without even discussing state-owned ports. 53 Cong. Rec. 8276 (1916).

Because Congress never expressed its intent to abrogate the states' immunity in the Shipping Act, neither the Commission nor the court below addressed the second prong of the analysis.[9] The record thus remains undeveloped with regard to congressional power to abrogate a state's immunity through the Shipping Act.

Only a provision in the Shipping Act that expressed Congress' clear intent to abrogate the State's immunity would be unconstitutional under the Fourth Circuit's decision. Because no such provision exists in the Shipping Act, the Fourth Circuit did not invalidate any congressional act, and this Court's attention is unwarranted.

### B. This Court Has Explicitly Rejected the Commission's Assertion that Federal Maritime Interests Can Trump the United States Constitution.

Even if this case involved the Commission's alleged "unique federal interest" (Petition at 16) over maritime commerce, the federal interest would not override a state's sovereign immunity. In *Alden*, this Court rejected "any contention that substantive federal law by its own force

[9] Congress may, for example, validly abrogate the States' immunity when acting pursuant to section 5 of the Fourteenth Amendment. *See, e.g., Garrett*, 121 S. Ct. at 962 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)). The Petition points to no constitutional provision on which Congress could lawfully have relied to abrogate a state's immunity in the regulation of the United States oceanborne commerce.



necessarily overrides" state sovereign immunity. *Alden*, 527 U.S. at 732. *Alden* further teaches that when a state asserts its immunity, the focus must be to implement the law "in a manner consistent with the constitutional sovereignty of the States." *Id.* Accordingly, although Congress may retain complete law-making authority in a particular area (*i.e.*, United States oceanborne foreign commerce), the doctrine of sovereign immunity "prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996) (sovereign immunity barred suit against the State of Florida by Indian tribes); *see also Breard v. Greene*, 523 U.S. 371 (1998) (sovereign immunity barred suit against State of Virginia for alleged violation of international treaty).

This Court previously rejected the identical argument made by the Commission that exempting states from suits by private parties would somehow destroy federal regulation of oceanborne foreign commerce. *See In re New York*, 256 U.S. 490 (1921). In that admiralty case, this Court respected the State of New York's sovereign immunity and held: "It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction." *Id.* at 503. "In the sovereign-immunity context, moreover, '[e]venhandness' between individuals and States is not to be expected: 'The constitutional role of the States sets them apart from other employers and defendants.'" *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 685-86 (1999) (quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 477 (1987)).

A strong federal interest in a particular subject matter cannot determine the application of sovereign immunity to a suit, as this Court held, regardless of whether the case involves a matter of exclusive federal interest–like Indian

tribes, *Seminole Tribe of Florida*, 517 U.S. at 72, or state court jurisdiction, *Alden*, 527 U.S. at 754. Accordingly, even the existence of a strong federal interest, as in maritime commerce, cannot justify overriding a state's sovereign immunity.[10]

Moreover, sovereign immunity does not preclude the federal government from protecting its interests because the States do not enjoy immunity from suits filed by the United States. Thus, the Commission can protect its alleged "unique federal interest" by assigning its staff to initiate an enforcement action against a state under the Shipping Act. *See Alden*, 527 U.S. at 759-60 ("the National Government must itself deem the case of sufficient importance to take action against the State"). The Commission declined to take action here.

The Commission's assertion of a "unique federal interest" in regulating maritime commerce as a ground for overriding a state's sovereign immunity thus merely repeats arguments previously made and rejected by this Court. *See, e.g., Seminole Tribe of Florida*, 517 U.S. at 44; *see also In re New York*, 256 U.S. at 490. For this reason, the Court should deny the Commission's petition for a writ of certiorari.

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[10] "Constitutional rights would be of little value if they could be . . . indirectly denied." *United States Term Limits, Inc. v. Thorton*, 514 U.S. 779, 829 (1995) (citations omitted). Accordingly, a requirement imposed by the Constitution is "equally applicable whether jurisdiction be exercised by a legislative court or a constitutional court." *Williams v. United States*, 289 U.S. 553, 581 (1933).



### C. No Conflict Exists Among the United States Courts of Appeals Regarding State Sovereign Immunity.

#### 1. *Current Appellate Court Decisions Uniformly Apply the Doctrine of Sovereign Immunity in Federal Administrative Adjudications filed by Private Parties against Unconsenting States.*

The Fourth Circuit's decision is consistent with the Tenth Circuit's decision in *Hensel*. In *Hensel*, an anesthesiologist filed a discrimination claim against the University of Oklahoma Health Services Center (a state entity) and the Oklahoma City Veterans Affairs Medical Center (a federal entity). The anesthesiologist claimed she was not hired because she was a United States citizen. *Hensel*, 38 F.3d at 506. The anesthesiologist filed her complaint with the Department of Justice Executive Office of Immigration Review, *id.* at 506-07, seeking an order requiring the state hospital to hire her and place her with the federal hospital. *Id.* at 509. Both the state and federal entities asserted sovereign immunity from the anesthesiologist's claims. *Id.* at 507. Applying this Court's decisions, the Tenth Circuit held that the doctrine of sovereign immunity barred the anesthesiologist's claims filed as to both the State of Oklahoma and the United States. *Id.* at 508-10.

A review of recent federal decisions reflects a universal understanding among the lower federal courts that sovereign immunity prohibits private persons from suing states before federal administrative agencies. *See Conn. Dep't of Envtl. Prot. v. OSHA*, 138 F. Supp. 2d 285 (D. Conn. 2001) (sovereign immunity prevented federal agency from adjudicating a whistleblower complaint filed by a state employee); *Fla. v. United States*, 133 F. Supp. 2d 1280, 1288 (N.D. Fla. 2001) ("If state sovereignty prohibits either the Congress under Article I of the Constitution or the federal courts under Article III from subjecting the state to claims of private

individuals, then surely the result should be no different for an agency created not by the Constitution itself but only by Congress under its Article I powers."); *Ohio Envtl. Prot. Agency v. Dep't of Labor*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000) (sovereign immunity applies to federal agency adjudicatory proceedings); *R.I. Dep't of Envtl. Mgmt. v. Dep't of Labor*, 115 F. Supp. 2d 269 (D.R.I. 2000) (a state's sovereign immunity protects it from prosecution of private complaints before OSHA). These lower court decisions uniformly apply the doctrine of sovereign immunity to bar private causes of action asserted before federal administrative agencies against unconsenting states. A conflict of authority simply does not exist.

### 2. *Cases Cited by the Commission Do Not Demonstrate a Split of Authority among the United States Courts of Appeals.*

The four cases cited by the Commission purporting to establish a split of authority among various courts of appeals rely either upon a waiver of sovereign immunity by the state or upon case law that is inapposite and this Court has overruled. As shown below, one case involves a proceeding brought by the federal government, not a private party; two cases involve waivers of immunity; and the fourth case involves the issue of Congressional intent to abrogate, which is not at issue here, and was implicitly overruled by this Court's decisions in *Seminole Tribe* and *Alden*. Thus, these cases do not present a circuit split on the question presented.

The Commission cites *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 567 (8th Cir. 1980), to support its position that the Eleventh Amendment does not bar administrative action against state entities. However, as explained by the court in *Rhode Island*, 115 F. Supp. 2d at 275-76, *Ellis Fischel* is inapposite because the Secretary of Labor, not a private citizen, initiated the administrative proceedings against the hospital. In *Ellis Fischel*, the Eighth Circuit



recognized that "[c]ourts have found no eleventh amendment bar to actions brought *by* federal administrative agencies pursuant to complaints of private individuals." *Ellis Fischel*, 629 F.2d at 567 (emphasis added).

Unlike *Ellis Fischel*, the instant case does not involve proceedings against the Ports Authority brought by the Commission. Instead, it involves a suit filed by a private party directly against the State. This Court has clearly explained the significant difference between an action initiated and prosecuted by a federal agency based on information received from a private party, and an action initiated and prosecuted by the private party himself.[11] Thus, *Ellis Fischel* does not provide authority for allowing a private party to prosecute claims against unconsenting states before federal administrative agencies.

The Eighth Circuit in *Ellis Fischel* relied upon *Brennan v. Iowa*, 494 F.2d 100 (8th Cir. 1974), in which the Secretary of Labor commenced an action against the State of Iowa in federal court. This suit by the Secretary of Labor, brought in the public interest, was a suit by the United States. *Id.* at 103. Therefore, the suit was not barred by the Eleventh Amendment or the doctrine of sovereign immunity. *Id.* at 104. Further, the court found that the State's activities were in "interstate commerce." *Id.* at 103. The "interstate com-

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[11] In *Alden*, this Court aptly recognized:

> The difference between a suit by the United States on behalf of [a private party] and a suit by the [private party] implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second.

*Alden*, 527 U.S. at 759-60. Thus, where a statute allows the United States to file suit against a State on behalf of a private party, the State still has not consented to a suit filed by that party directly nor has Congress abrogated the States' immunity from suits filed by private parties.

merce" finding was significant because at the time the court decided *Brennan*, this Court's decision in *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964) controlled. In *Parden*, the statute at issue subjected all rail common carriers engaging in interstate commerce to suit, and the Court held that by operating a railroad in interstate commerce, the State constructively waived its sovereign immunity and consented to suit. *Id.* at 192. However, this Court expressly overruled *Parden* in *College Savings Bank*. 527 U.S. at 680-83; *see also Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987) (overruling *Parden* to the extent it is inconsistent with the requirement that Congress' abrogation of a state's immunity "must be expressed in unmistakably clear language"). Therefore, *Brennan* does not support the Commission's argument.

The Eighth Circuit in *Ellis Fischel* also relied upon *Marshall v. A & M Consolidated Independent School District*, 605 F.2d 186 (5th Cir. 1979), in which the Secretary of Labor sued a Texas public school district. The plaintiff was the United States, not a private party, and the Eleventh Amendment did not apply. *Id.* at 188. Further, as pointed out in the concurring opinion, the school district was not a state entity for purposes of the Eleventh Amendment, and under *Parden*'s then-controlling rationale, the Commerce Clause would have permitted suit even if the Eleventh Amendment applied. *Id.* at 191 (Clark, J., concurring).

The Eighth Circuit also relied upon *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), which does not support either the holding in *Ellis Fischel* or the Commission's argument in the present case. Again, that case is based almost entirely upon the overturned holding of *Parden*. The Court only referred to the activities of an administrative agency when it noted that the Secretary of Labor had the power to bring suit in federal court and that the Constitution did not bar such a suit by the United States



against a state. *Id.* at 286. This Court found no congressional intent to abrogate the Eleventh Amendment under the Act and stated: "The policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor." *Id.* Similarly, the Commission can implement the policy of the Shipping Act, as to the States, through its power to investigate state maritime practices and litigate Shipping Act violations.

Finally, the Eighth Circuit in *Ellis Fischel* relied upon *United States v. Mississippi*, 380 U.S. 128 (1965), in which the United States, acting pursuant to the Fourteenth and Fifteenth Amendments, sued the State of Mississippi for hampering and destroying the right of black Americans to vote. First, the Eleventh Amendment was not even at issue because the United States, not a private party, sued the State. *Id.* at 138-141. Second, the suit was based on the Fourteenth and Fifteenth Amendments and statutes enacted pursuant to those amendments. *Id.* at 130. Therefore, the Eleventh Amendment would not bar such a suit in any event. Third, the case contains no mention or hint of administrative action. *Mississippi* does not support either the Eighth Circuit's finding that the Eleventh Amendment is not a bar to administrative action or the Commission's argument that the Eleventh Amendment does not apply to private complaint proceedings before federal agencies.

According to the Eighth Circuit, implicit in these four cases is

> the conclusion that administrative action against states pursuant to individual complaints does not run afoul of the eleventh amendment. For it would be absurd to hold that the eleventh amendment did not bar the Secretary from bringing a lawsuit, but did bar the Secretary from

> proceeding administratively to determine if the lawsuit was warranted.[12]

*Ellis Fischel*, 629 F.2d at 567. However, the Eighth Circuit's implicit conclusion that the United States may investigate a violation does not support a conclusion that private parties may litigate claims against unconsenting States. Although the United States may sue a state because it is "inherent in the constitutional plan," *Monaco v. Mississippi*, 292 U.S. 313, 329 (1934), the authority of the United States to investigate and sue a state does not grant private parties similar rights.[13]

This Court has expressly rejected the United States' authority over the states as a basis for allowing private suits against the states.

> The consent, "inherent in the convention," to suit by the United States—at the instance and under the control of

[12] In *Ellis Fischel*, the statute at issue authorized the Secretary to "file a civil action in the United States district court in which the violation was found to occur to enforce such order." *Ellis Fischel*, 629 F.2d at 568 (citing 42 U.S.C. § 5851(d)). The Shipping Act does not authorize the Commission or any other federal entity to file an action to enforce a reparation order.

[13] In discussing the States' sovereign immunity, this Court quoted "the following profound remarks" from the Federalist Papers in *Hans v. Louisiana*, 134 U.S. 1, 12 (1890):

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states . . . . [T]here is no color to pretend that the state governments would, by the adoption of that [Constitutional] plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."

*Id.* at 13 (quoting THE FEDERALIST NO. 81, at 567 (Alexander Hamilton) (H. Dawson ed. 1876)).



> responsible federal officials—is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself.

*Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991). Although the Commission has the authority to investigate state compliance with federal law, the federal authority to investigate and sue on behalf of the United States does not permit a private litigant to sue the Ports Authority before the Commission.[14]

Thus, the Commission is free to initiate an investigation into the State of South Carolina's actions, but the Commission may not rely upon privately initiated complaints to regulate a state. *See* Pet. App. A at 23a ("The fact that sovereign immunity applies to private proceedings means only that the federal government, not a private party, must vindicate the federal interest when a state is involved"). *Ellis Fischel* merely supports the Commission's authority to investigate states and to bring its own actions against states, but does not support the Commission's asserted authority to adjudicate private suits against the States. The Commission's authority to investigate and commence litigation on behalf of the United States was explicitly recognized not only by the Fourth Circuit, but also by the Ports Authority before the administrative law judge, the Commission, and the Fourth Circuit. "In short, the federal government itself [must] 'deem the case of sufficient importance to take action against the State.'" Pet. App. A at 24a (citing *Alden*, 527 U.S. at 759-60). "What Congress simply cannot do under its Article I power is subject an unconsenting state to an adversarial

[14] The Bureau of Enforcement is not a party to this case. *See* Rule 42, Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.42 (2000). Therefore, this is a suit by a private party against a state entity, and the Eleventh Amendment applies.

proceeding brought by a private party." *Id.* The Commission's interpretation of *Ellis Fischel* does not accurately reflect Eleventh Amendment and sovereign immunity jurisprudence nor does the case represent a circuit court conflict.

In its petition, the Commission contends that several cases dealing with the Randolph-Sheppard Vending Stand Act establish a conflict among the courts of appeals. Petition at 18-20. They do not. The Vending Stand Act requires each state agency, before accepting federal funds, to agree to resolve disputes by binding arbitration. 20 U.S.C.A. § 107b(6) (West 2000). Thus, two of the cases cited by the Commission hold that the State entity waived its Eleventh Amendment immunity by agreeing to binding arbitration. *See Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997) ("The overwhelming implication of the statute is that by agreeing to participate in the Randolph-Sheppard program, states have waived their sovereign immunity to enforcement of such awards in federal court."); *Del. Dep't of Health & Soc. Servs. v. United States Dep't of Educ.*, 772 F.2d 1123, 1137 (3d Cir. 1985) (holding that Delaware waived its immunity when it voluntarily applied to participate in the Randolph-Sheppard program after full notice that the Act required an agreement to arbitrate disputes). The Ports Authority has not waived its immunity, and the Commission does not contend that it has.

In the third case cited by the Commission, *Tennessee Department of Human Services v. United States Department of Education*, 979 F.2d 1162 (6th Cir.1992), the Sixth Circuit held that the Eleventh Amendment does not apply to arbitration proceedings because the Amendment applies only to Article III proceedings. *Id.* at 1166-67. However, this Court expressly rejected that position in *Alden* when it held that the Eleventh Amendment applies in state courts. *Alden*, 527 U.S. at 754. The Sixth Circuit in *Tennessee* also considered whether Congress had expressed an intent to abrogate



a state's immunity when legislating pursuant to the Commerce Clause in Article I. *Tennessee Dep't of Human Servs.*, 979 F.2d at 1166, 1168 (citing *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)). However, this Court overruled *Union Gas* in *Seminole Tribe* when it held that Article I does not authorize Congress to abrogate the States' sovereign immunity. *Seminole Tribe of Florida*, 517 U.S. at 63-73. Whatever the continuing validity of *Tennessee* in light of this Court's decisions in *Alden* and *Seminole Tribe*, the Commission has presented no evidence that Congress intended to abrogate the States' immunity.[15]

In summary, the Randolph-Sheppard Vending Stand Act cases the Commission cites do not support its argument that private individuals can sue unconsenting states in Article I tribunals. Two of those cases are inapplicable because they involve implied waivers of sovereign immunity, and one is inapplicable because it is inapposite and predates current Supreme Court precedent delineating the scope of a state's sovereign immunity. Thus, the Commission's petition fails to establish the existence of a split in legal authority.

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[15] *See infra* pp. 17-18 for a discussion of legislative history.

## CONCLUSION

For the foregoing reasons, the Court should deny the Commission's petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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# APPENDICES

## APPENDIX A

### UNITED STATES CODE ANNOTATED
### TITLE 15. COMMERCE AND TRADE CHAPTER 24— TRANSPORTATION OF GAMBLING DEVICES

§ 1175. Specific jurisdictions within which manufacturing, repairing, selling, possessing, etc., prohibited; exceptions.

(a) General rule. It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18, including on a vessel documented under chapter 121 of Title 46 or documented under the laws of a foreign country.

(b) Exception.

(1) In general. Except for a voyage or a segment of a voyage that begins and ends in the State of Hawaii, or as provided in paragraph (2), this section does not prohibit—

(A) the repair, transport, possession, or use of a gambling device on a vessel that is not within the boundaries of any State or possession of the United States;

(B) the transport or possession, on a voyage, of a gambling device on a vessel that is within the boundaries of any State or possession of the United States, if—

(i) use of the gambling device on a portion of that voyage is, by reason of subparagraph (A), not a violation of this section; and

(ii) the gambling device remains on board that vessel while the vessel is within the boundaries of that State or possession; or

(C) the repair, transport, possession, or use of a gambling device on a vessel on a voyage that begins in the State of Indiana and that does not leave the territorial jurisdiction of that State, including such a voyage on Lake Michigan.

(2) Application to certain voyages

(A) General rule. Paragraph (1)(A) does not apply to the repair or use of a gambling device on a vessel that is on a voyage or segment of a voyage described in subparagraph (B) of this paragraph if the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage or segment.

(B) Voyage and segment described. A voyage or segment of a voyage referred to in subparagraph (A) is a voyage or segment, respectively—

(i) that begins and ends in the same State or possession of the United States, and

(ii) during which the vessel does not make an intervening stop within the boundaries of another State or possession of the United States or a foreign country.

(C) Exclusion of certain voyages and segments. Except for a voyage or segment of a voyage that occurs within the boundaries of the State of Hawaii, a voyage or segment of a voyage is not described in subparagraph (B) if such voyage or segment includes or consists of a segment—

(i) that begins and ends in the same State;

(ii) that is part of a voyage to another State or to a foreign country; and



(iii) in which the vessel reaches the other State or foreign country within 3 days after leaving the State in which such segment begins.

(c) Exception.

(1) With respect to a vessel operating in Alaska, this section does not prohibit, nor may the State of Alaska make it a violation of law for there to occur, the repair, transport, possession, or use of any gambling device on board a vessel which provides sleeping accommodations for all of its passengers and that is on a voyage or segment of a voyage described in paragraph (2), except that such State may, within its boundaries—

(A) prohibit the use of a gambling device on a vessel while it is docked or anchored or while it is operating within 3 nautical miles of a port at which it is scheduled to call; and

(B) require the gambling devices to remain on board the vessel.

(2) A voyage referred to in paragraph (1) is a voyage that—

(A) includes a stop in Canada or in a State other than the State of Alaska;

(B) includes stops in at least 2 different ports situated in the State of Alaska; and

(C) is of at least 60 hours duration.

## APPENDIX B

In *Hensel v. Office Of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994), the U.S. Department of Justice successfully asserted sovereign immunity on behalf of the United States and respondent Oklahoma City Veterans Affairs Medical Center. There, the context was a proceeding before an administrative tribunal of the same U.S. Department of Justice. The following is an excerpt from pages 18-20 of the brief for the United States:

### ARGUMENT

I. THE IRCA [IMMIGRATION REFORM AND CONTROL ACT] DOES NOT WAIVE THE SOVEREIGN IMMUNITY OF THE UNITED STATES

In the administrative proceedings below, the VA Hospital argued that the ALJ did not have jurisdiction over it because the IRCA does not waive the federal government's sovereign immunity. *See* AR 2740-42, 4257-58. The ALJ found it unnecessary to address this issue given the holding that petitioner had failed to meet her burden in defending the motion for summary decision. AR 19.

Because the sovereign immunity issue determines this Court's jurisdiction with respect to the federal government, the court must decide it even though the ALJ declined to do so. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). Moreover, this Court can affirm on any ground supported by the record even if that ground did not form the basis of the ALJ's decision. *Aspinall v. United States*, 984 F.2d 355, 357 (10th Cir. 1993). This Court reviews the sovereign immunity issue *de novo*. *Sierra Club v. Lujan*, 972 F.2d 312, 314 (10th Cir. 1992).

"It has long been established that * * * the United States, as sovereign, 'is immune from suit save as it consents to be sued



. . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *see* also *Sierra Club*, 972 F.2d at 314. Sovereign immunity extends to federal agencies and officers acting in their official capacities. *See Western Shoshone Business Council v. Babbit*, 1 F.3d 1052, 1058 (10th Cir. 1993); *see, e.g., Irwin v. Veterans Admin.*, 498 U.S. 89, 93-94 (1990).

Sovereign immunity bars an action if, among other things, "'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration' . . . or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Application of the IRCA to the VA Hospital in this case plainly would implicate sovereign immunity. Dr. Hensel seeks an order requiring the VA Hospital to hire her (AR 14), which would compel the government to act. She also seeks back pay (*id.*), which would expend itself on the United States Treasury. Therefore, sovereign immunity bars this action unless it has been waived.

As we show below, nothing in the text of the IRCA contains the unequivocal expression necessary to waive the federal government's sovereign immunity. The VA Medical Center, as a field office of the Veterans Administration,

cannot be hailed into court under the jurisdictional provisions of the IRCA.[1]

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[1] We note that Respondent Oklahoma Health Services Center contends that it is protected by Eleventh Amendment immunity, and that the IRCA does not waive that immunity. This case involves a claim brought against Oklahoma by a private individual, and does not raise the issue of whether the United States could bring an action against a state for alleged violation of the IRCA. Accordingly, in resolving the state's argument for immunity in this case, the Court need not decide whether a claim brought by the Office of Special Counsel (a component of the Department of Justice) also would be barred by the Eleventh Amendment. With respect to any such claim, we note that the Supreme Court has stated that the Eleventh Amendment would not bar such an action. *See West Virginia v. United States*, 479 U.S. 305, 311-12 & n.4 (1987). In any event, the University's Eleventh Amendment argument does not affect our reliance upon and analysis of the sovereign immunity of the United States, which is broader than a state's Eleventh Amendment immunity. *See e.g., Missouri v. Jenkins*, 491 U.S. 274, 280-81 & n.3 (1989); *Reopell v. Commonwealth of Massachusetts*, 936 F.2d 12, 15 (1st Cir.), *cert. denied*, 112 S. Ct. 637 (1991).